Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Petition for Rulemaking	)	
of Public Employees for	)	
Environmental Responsibility	)	**RM No. 9913**

OPPOSITION OF GLOBAL CROSSING LTD.

In accordance with Section 1.405 of the Commission's rules, 47 C.F.R. § 1.405, Global Crossing Ltd. ("Global Crossing"), by its undersigned counsel, hereby submits this statement in opposition to the Petition for Rulemaking ("Petition") of the Public Employees for Environmental Responsibility ("PEER").[1]

INTRODUCTION

In its Petition, PEER's primary claim appears to be that the Commission's environmental review of cable landing license applications and other facilities authorizations is insufficient to meet the requirements of the National Environmental Policy Act of 1969 ("NEPA").[2] PEER also claims that the Commission's implementation of NEPA allows applicants seeking approval to construct telecommunications facilities to self-certify their compliance with NEPA requirements.

Global Crossing, a leading independent provider of global submarine and terrestrial telecommunications facilities and services, like PEER, recognizes the importance and significance of the land use and environmental issues involved in the deployment of undersea

[1] *See* Public Notice, Consumer Information Bureau Reference Information Center, Petition for Rulemaking Filed, Report No. 2426 (rel. July 14, 2000).

[2] *See* 42 U.S.C. § 4321 *et seq.* In this Opposition, Global Crossing limits its detailed comments to the aspects of the Petition involving NEPA review of submarine cables, given the Company's extensive experience over the last three years with the deployment of undersea cable systems in the U.S. and the apparent focus of the Petition on cable landing license issues. Although not addressed within these comments, Global Crossing similarly believes that there

cable systems. While sympathetic to the environmental concerns underlying PEER's Petition, Global Crossing nonetheless believes that the Petition reflects a misapprehension of the Commission's responsibilities under NEPA. The Petition also overlooks the extensive federal and state environmental reviews to which cable projects are routinely subjected prior to the commencement of construction, and which continue throughout the life of the cable project. In sum, the Petition fails to make a case for changes to the Commission's NEPA regulations or to the implementation of those regulations as applied to the undersea cable industry. Accordingly, the Petition should be dismissed.[3]

DISCUSSION

A. Background

PEER suggests that the Commission's NEPA rules have created an environment of industry "self-regulation" and "self-certification" by which rigorous public inquiry is avoided.[4] To support its premise, PEER offers several environmental incidents relating, with one exception, to the installation of submarine cables. Implicitly, the thrust of PEER's argument is that had these projects been subject to more rigorous environmental review by the Commission, the incidents cited by PEER could have been avoided.[5] Accordingly, PEER asserts that the Commission should treat the deployment of all submarine cables as potentially damaging to the environment and require, at a minimum, an environmental assessment ("EA") for those facilities that would be installed and operated by what it terms "public utilities," and an even more

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is no basis to commence a rulemaking proceeding with respect to the Commission's consideration of terrestrial fiber optic facilities.

[3] PEER also fails to adequately explain how its interests are effected by this proceeding, as required of a petitioner under the Commssion's rules. *See* 47 C.F.R § 1.401(c).

[4] Petition at 2, 5.

[5] PEER's examples underscore just one of a series of substantive inconsistencies and errors in its Petition. PEER's arguments and examples of "NEPA violations" have nothing to do with the NEPA review process nor do they support a need for changes to FCC's NEPA implementation. In fact, these examples demonstrate strong enforcement actions taken by the various responsible agencies.

rigorous environmental impact statement ("EIS") for those facilities being installed and operated by what it terms "private utilities."[6]

PEER effectively asks the Commission to evaluate its administration of NEPA in a vacuum, as if the Commission's authority to grant cable landing licenses renders it the exclusive federal agency with jurisdiction to review and consider the potential impacts of installing and landing submarine cables in the United States. To the contrary, the Commission's administration of its NEPA responsibilities must be considered in light of NEPA's scheme for coordinated federal agency action, as implemented through the regulations of the Council on Environmental Quality ("CEQ").

For this reason, the central premise underlying PEER's petition – that the undersea cable industry's environmental compliance is self-regulating or self-certifying is incorrect. Consistent with this coordinated federal framework, the Army Corps of Engineers, a federal resource agency with significant expertise in this area, customarily takes the lead on environmental reviews of submarine cable projects, undertaking, where appropriate, in-depth environmental study of potential project impacts. At the state level as well, this approval process involves extensive and thorough analyses of potential environmental impacts. Indeed, overall, construction of a single cable system involves review and some form of approval by as many as

[6] PEER's suggestion to tie the level of environmental review to whether a cable is a "private" or "public" utility – presumably a reference to private cables versus common carrier cables – makes no sense. First, the Commission has previously found that private cables are an efficient, pro-competitive form of entry, and such a rule would skew entry decisions, providing a disincentive to deploy private carrier systems. Second, the EA/EIS decision should be based on the potential for environmental impacts, which is unrelated to the operator's mode of entry. PEER's argument that "some local regulators" have adopted this "new paradigm" (Petition at 7), is also misleading given that the comments of the "local regulator" cited by PEER as supporting this approach were actually submitted by PEER's counsel in his capacity as Chair of a Maryland town's Planning & Zoning Commission.

25 different governmental resource and land use agencies and can take over two years to complete.[7]

B. The Commission's Regulation of Undersea Cables Complies with NEPA

The purpose of the CEQ NEPA implementation regulations is to "tell federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA]."[8] Through its regulations, CEQ has sought, "to reduce paperwork and delays by eliminating unnecessary environmental processing and to improve the quality of agency decisions that affect the environment."[9] Specifically, the CEQ regulations direct federal agencies to categorize their activities in a way that eliminates the need for environmental processing of certain types of actions that, in the agency's expert judgment, are not likely to have a significant impact on the environment.[10] Moreover, the CEQ regulations require federal agencies to coordinate with other agencies taking action on a project and to avoid duplication in the NEPA process.[11]

The FCC's current NEPA implementation regulations[12] were promulgated in consultation with CEQ to ensure compliance with the coordinated federal framework.[13] Indeed,

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[7] Global Crossing has been an industry leader in working cooperatively with federal, state and local agencies, as well as interested parties and stakeholders to ensure the early examination of impact issues. Overall, the environmental review of submarine cable projects occurs from the initial planning stages of a project through removal of the cables at the end of their useful lives. As part of the federal, state, and local permitting process, Global Crossing and its project companies routinely provide extensive data in anticipation of and in response to agency questions and public comments on the potential environmental impact associated with a given project. Its projects also typically include the voluntary incorporation of appropriate mitigation measures to address the various concerns that are raised. Global Crossing has also been an industry leader in working with local fishing interests in order to avoid negative impacts to fishers, and to identify and address fishing industry concerns.

[8] 40 C.F.R. § 1500.1.

[9] Report and Order, *Matter of Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, 60 Rad. Reg. 2d 13, ¶ 2 (1986) ("*1986 NEPA Order*") (citing *Council on Environmental Quality, National Environmental Policy Act, Implementation of Procedural Provisions, Final Regulations*, 43 Fed. Reg. 55,978 (1978)).

[10] *See* 40 C.F.R. § 1501.4(a)(2) (directing agencies to determine "whether the proposal is one which . . . [n]ormally does not require either an environmental impact statement or an environmental assessment (categorical exclusion)").

[11] *See* 40 C.F.R. §§ 1501.6, 1506.2 (requiring agencies to cooperate and avoid duplication of the NEPA process).

[12] 47 C.F.R. Subpart I.

[13] *1986 NEPA Order*, 60 Rad. Reg. 2d 13, ¶ 3.

as PEER notes, "[t]he Commission's rules have been drafted to meet the needs of NEPA."[14] Consistent with the NEPA framework, when the FCC first implemented NEPA regulations in 1974, it determined after notice and comment that undersea cables are not likely to have a significant impact on the environment and thus would be categorically excluded from environmental processing.[15] In its order, the Commission concluded that:

> Although laying transoceanic cable obviously involves considerable activity over vast distances, the environmental consequences for the ocean, the ocean floor, and the land are negligible. In shallow water, the cable is trenched and immediately covered; in deep water, it is simply laid on the ocean floor. In the landing area, it is trenched for a short distance between the water's edge and a modest building housing facilities.[16]

In 1999, the FCC revisited the environmental impact of undersea cable systems, this time informed by an additional 15 years of experience regulating the landing and operation of cable systems. After a notice and comment period, including notification to CEQ of its proposal, the FCC concluded again that "*submarine cable systems, individually and cumulatively, will not have a significant effect on the environment* and therefore should be expressly excluded from our environmental processing requirements."[17]

Accordingly, the FCC generally does not require an EA or EIS as part of a cable landing license application. To impose a blanket rule, requiring an EA or EIS for *all* cable projects, as PEER suggests, would turn the agency's responsibility under NEPA on its head, and would result in a tremendous waste of resources for the agency, applicants and the public.

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[14] Petition at 9.

[15] Report and Order, *Matter of Implementation of the National Environmental Policy Act of 1969*, 49 F.C.C.2d 1313, ¶ 17 (1974) ("*1974 Implementation Order*").

[16] *Id.*

[17] Report and Order, *Matter of 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, 14 FCC Rcd 4909, ¶¶ 67-68 (1999) (emphasis added) ("Biennial Review"). PEER's petition thus is little more than an untimely request for reconsideration of the issues addressed in this proceeding. As such, the petition is procedurally defective and should be dismissed on this basis, as well. *See* 47 C.F.R. § 1.401(e) (providing for dismissal of petitions that are repetitive or do not warrant Commission consideration).

In appropriate circumstances, however, the Commission's administration of NEPA in connection with its cable landing license actions does provide for environmental analysis. Importantly, although the construction of new submarine cable systems is categorically excluded, the Commission's rules provide that upon review of an application if the Commission determines that the proposed cable system may have a significant environmental impact, the Commission "shall" require the preparation of an EA.[18] The Commission's determination that a proposal may have a significant impact may be raised by any interested party or by the Commission pursuant to its own review of the proposal.[19]

PEER's suggestion that the FCC refrain from issuing a license until an applicant has obtained environmental approvals from other responsible agencies (*see* Petition at 9-11) is both unnecessary and contrary to the goals of the CEQ's implementation regulations. The FCC has considerable flexibility either to require that an applicant obtain all environmental approvals prior to granting a license, or, as is customary in the context of cable landing licenses, to condition approval of the license on the Commission's right to require an EA or EIS should the need arise.[20] The FCC's discretion regarding the timing of EAs is a crucial tool for the Commission in its efforts to effectively and efficiently coordinate with local, state, and federal environmental review of cable system projects while minimizing unnecessary delays and obstacles. A requirement that the Commission withhold issuance of cable landing licenses pending environmental reviews by other agencies, if applied to all involved agencies with NEPA

[18] *See* 47 C.F.R. § 1.1307(d).
[19] *Id.* § 1.1307(c)-(d).
[20] CEQ regulations leave the timing of an EA, to the extent one is required, to the agency's discretion. 40 C.F.R. § 1501.3(b) (agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking).

obligations, would severely encumber – if not halt entirely – an already complex environmental permitting and approval process.[21]

The Commission's NEPA compliance is also achieved through agency coordination. Consistent with CEQ regulations, which contemplate that an agency's NEPA compliance may include use of other agencies' resources,[22] the Commission's practice has been to coordinate with other federal resource agencies having jurisdiction and particular expertise over potential impacts associated with the construction of telecommunications facilities. For example, in its *1974 Implementation Order*, the FCC recognized that other federal resource agencies routinely have a role in the authorizations required for the deployment of communications facilities, and that it made sense for these other better-equipped agencies, in the first instance, to prepare environmental analyses:

> There may . . . be close cases in which important (or even vital) communications facilities significantly impact the land. . .. In such circumstances, we would think that the [federal] land agency is better equipped to prepare an environmental statement . . . The land agency's grant of a use permit is persuasive evidence that the facilities to be constructed will not significantly affect the environment . . . However, the grant of a permit does not . . . excuse the Commission from considering the question of environmental effect under NEPA standards and procedures, if the land agency has not done so.[23]

With respect to submarine cable systems, as discussed above, the Army Corps of Engineers ("Corps") is customarily the lead federal agency for NEPA compliance.[24] As the lead

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[21] In fact, in Global Crossing's experience, many resource and land use agencies will not complete processing of an application related to a submarine cable project in the absence of an FCC cable landing license.

[22] 40 C.F.R. § 1507.2.

[23] *1974 Implementation Order*, ¶ 41. As discussed above, this is precisely the Commission's practice today with respect to cable landing licenses, which are routinely conditioned on the Commission's right to require an EA or EIS and modify the license in appropriate circumstances.

[24] The CEQ regulations define "lead agency" as the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement. *See* 40 C.F.R. § 1508.16; *see also* 33 C.F.R. § 230.16(a) ("[t]he Corps will normally be the lead agency for Corps civil works projects"). Because construction of a new cable system inevitably passes "in or through the navigable waters of the United States," such construction invariably requires a permit from the Corps pursuant to Section 10 of the Rivers and Harbors Act of 1899 ("Section 10 Permit"). 33 C.F.R. §§ 322.5(a), 322.5(h)(3). In addition, to the extent cable installations involve the discharge of dredged or fill material, the applicant must also obtain a permit from the Corps pursuant to Section 404 of the

agency, the Corps coordinates its review with the appropriate federal, state, and local agencies, and with the general public.[25] Similar to the FCC's process, the Corps has determined that the permitting of certain activities related to the construction of undersea cables will be handled under the Nationwide Permit ("NWP") process,[26] a process reserved for "*only those activities that have minimal adverse environmental effects, individually or cumulatively.*"[27] In situations where the Corps determines that a particular project would potentially have an adverse effect on the environment or otherwise may be contrary to the public interest, the project may be taken out of the NWP process, and the prospective permittee must seek an individual permit, requiring preparation of an EA (or an EIS in appropriate circumstances).[28]

As the foregoing demonstrates, the Commission's rules and practices involving undersea cables comply with NEPA and CEQ's NEPA implementation regulations. Because the FCC is currently in compliance with NEPA, and the suggestions of PEER are at best unnecessary and at worst decidedly contrary to the NEPA scheme, PEER's Petition should be rejected.

Clean Water Act. *Id.* Parts 323 and 324. Other permit obligations may also apply to particular cable projects depending on a number of factors, including whether the cable is traversing sensitive habitats.

[25] *See* 33 C.F.R. § 330.1; *id.* Part 230, Appendix A, entitled "Environmental Quality Procedures for Implementing NEPA."

[26] Nationwide Permit 12 will be required for the "construction, maintenance, and repair of utility lines and associated facilities in waters of the United States." "Utility lines" include, among other things, "any cable, line or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication." *See Decision Document, Nationwide Permit 12* (1998) at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm.

[27] *See Finding of No Significant Impact for the Nationwide Permit Program* (1998) at http://www.usace.army.mil./inet/functions/cw/cecwo/reg/nw98fons.htm (emphasis added).

[28] *See* 33 C.F.R. § 330.1. Where the Corps proceeds by individual permit, it conducts an EA that evaluates, among other things, the impact of the project on such factors as the affected environment; special aquatic sites; water quality; fish and wildlife; flood hazards and floodplain values; cultural resources and historic properties; endangered species; secondary impacts; navigation; marine sanctuaries; and an evaluation under EPA standards of the discharge of dredged or fill materials into U.S. waters. Ultimately, after the permittee and the Corps respond to comments received from the public and other agencies, the Corps may require the inclusion of various mitigations that will enable it to make a finding that the project will have no significant impact on the environment. If the Corps is unable to make such a finding, it will ultimately require preparation of an environmental impact statement.

C. State and Local Environmental Reviews Further Demonstrate that PEER's Concern Regarding Self-Certification is Misplaced

A similar environmental review process occurs at the state and local level, further demonstrating that PEER's concern regarding environmental self-certification is misplaced. Akin to the federal level, in situations where approvals from multiple state and local organizations are required to land a cable, a single lead state agency will typically handle the environmental review under the state law analog to NEPA. In addition, it is not uncommon for a state permitting authority to conduct its own independent, *de novo* environmental review and analysis, revisiting issues that have already been considered and passed on by another permitting agency.[29]

Global Crossing's experience has been that while formal environmental review during the application process differs with each agency depending on the particular facts of a proposed project, the state environmental reviews have been thorough and extensive. Hearings and agency meetings are held (open for public participation) and the public is given notice and an opportunity to comment at each stage of the environmental review process. Some form of environmental assessment is virtually always prepared at the state level, with some projects requiring the state equivalent of an environmental impact statement. Once granted, permits typically include extensive conditions and mitigations that cover every stage of the 25-year life cycle of a cable, including ongoing monitoring obligations from the installation of the cables through their removal. In sum, state environmental review of cable projects, together with the

[29] Thus, for example, in California, the State Lands Commission may require a detailed environmental analysis in connection with a cable landing and hold a public hearing on the project associated with its grant of a submerged lands lease. Subsequently, the California Coastal Commission may require its own detailed submission, conduct its own environmental review, and hold a public hearing on whether to issue a required Coastal Development Permit under the California Coastal Act. Such analysis largely, if not completely, duplicates the one already completed by the State Lands Commission.

review of cable projects at the federal level, leaves no doubt that PEER's assertion that the industry is self-certifying and self-regulating environmental compliance is baseless.

CONCLUSION

As PEER acknowledges, the Commission's rules fulfill its obligations under NEPA. The central premise of its Petition – that NEPA compliance is self-certifying – is incorrect. As shown herein, cable landings are subject to comprehensive environmental reviews at the federal level and at the state and local levels. Requiring the FCC to prepare its own EA or EIS for each cable landing license application would turn NEPA on its head, would needlessly obstruct deployment, and would waste public and private resources.[30] For all these reasons, there is no basis for PEER's Petition and it should be dismissed.

Respectfully submitted,

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[30] Given the foregoing there is no need to address PEER's rather extreme request that the Commission reopen all previously granted Commission licenses and authorizations for further environmental review. Granting such relief, apart from the logistical issues, raises fundamental issues of due process, fairness and administrative law.

CERTIFICATE OF SERVICE

I, Joanne Little, do hereby certify that copies of the forgoing Opposition of Global Crossing Ltd. have been served on the persons listed below via first class mail delivery or as otherwise indicated on this 14th day of August, 2000.

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